United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7153

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

RUTH JOHNSON, ET ALS

Plaintiffs-Appellants

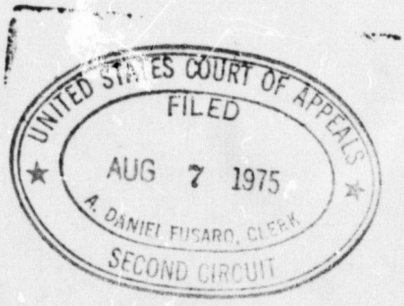
v.

HENRY C. WHITE,
COMMISSIONER OF WELFARE,
STATE OF CONNECTICUT

Defendant-Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLEE



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STATEMENT OF ISSUES

1. Was the District Court's consolidation of the Hearing to Dissolve the Preliminary Injunction with a Hearing on the Merits a violation of Rule 65(a)(2) of the Federal Rules of Civil Procedure?

2. What weight should be given to the Department of Health, Education and Welfare's (HEW) participation in the formulation of the Connecticut Flat Grant Program?

3. Was the Connecticut Welfare Department's method of consolidating and averaging needs in compliance with 42 U.S.C. §602(a)(23)?

4. Did the Connecticut Welfare Department's method of combining equal family shelter needs with unequal, or

shared, family shelter needs violate 42 U.S.C. §602 (a)(23)?

5. Did the method used by the Connecticut Welfare Department to up date the components, which made the AFDC budget, comply with 42 U.S.C. §602(a)(23)?

6. Was the Connecticut Welfare Department's statistical method proper, and were there any mathematical mistakes made in the sample that would be grounds for reversal and remand to the Trial Court?

STATEMENT OF THE CASE

The Connecticut Welfare Department (CWD) decided early in 1971 to convert the payments made in the Aid to Families with Dependent Children (AFDC) Program from a system based on individual family need to a flat grant system with each family of the same size getting the same standard of need and the same level of benefits.

Connecticut paid a level of benefits which was 100 per cent of the standard of need. The flat grant system would be achieved by averaging out all the components in the AFDC recipient's budget, including shelter, food, clothing, personal incidentals, household supplies, special recurring needs, and special non-recurring needs throughout the entire AFDC population.

At that time, the Department used 18 different regional standards of rent. These were based on 18 different low cost public housing regions, where the rent was based

on room allowance by family size, and the rent included heat and utilities. There were also 18 different private housing standards based on the public housing rate in the same region plus 10 per cent if the rent was unfurnished and an additional 10 per cent if the rent was furnished. In addition, in private housing heat and utilities were paid on a standard. The recipient was also entitled to be paid, as a special need, excess utilities at the actual cost expended for these excess utilities.

The Department actually paid over-standard rents in approximately 28 per cent of its total case load and approximately 38 per cent in its private housing rents. (See Exhibit F entitled "Special Survey of Shelter Rents" which is attached to the HEW Brief, where the percentages have been mathematically calculated from the figures given) Approximately 25 per cent of the AFDC recipients lived in public housing. (HEW Brief, Exhibit F)

The Department also updated its rent maximum from $125.00 per month to $160.00 per month. This was based on a survey of 25 per cent of the total AFDC case load and was done in 1970 at HEW's request. This survey showed that 99.5 per cent of the AFDC families in 1970 were paying less than $160.00 a month for their rent. Therefore, the $160.00 a month represented an actual maximum in the life of the vast majority of AFDC families. (Defendant's Exhibit 24, pages 4-5. Continued Deposition of Jean Seckinger).

The Department paid on a fixed standard, based on family size and age, food, clothing, personal incidentals, and household supplies. In addition, the Department paid the following special recurring and non-recurring special needs as they were requested by the recipient:

*Special clothing

Scout uniforms

Installment payments on clothing, appliances, furniture and furnishings, personal and small loans

Life, hospital, and personal health insurance premiums

Telephone

Telephone installation

*Furniture and home furnishings

Utility shut-off

Laundry

Transportation

Garbage Collection

**Therapeutic diet costs

Appliance installation

Chore boy

Repairs of household appliances, furniture and furnishings

*Appliances

Excess utility costs

Summer campership

*Not including replacement needed as a result of a catastrophe

**A food substitute vital to the health of an applicant or a recipient may be provided under Title XIX.

(HEW Brief, Appendix I, Manual Vol. 1, Connecticut State Welfare Department, Social Service Policies-Public Assistance, Expenses - AFDC, Section 5000 - 5010)

To accomplish the task of setting up the flat grant, the Department used a 12 per cent sample of 3,079 AFDC families out of an AFDC family population of 26,000.

The information used was taken off W-52T forms entitled "Authorization and Report" and W-250 forms entitled "Vendor Authorization Payments". These forms were used to find the total family budgeted needs for the year June 1, 1970 through May 31, 1971. If the family budget remained unchanged throughout the year, the W-52T would remain unchanged but in all cases it would reflect the last budget the family needed up until May 31, 1971. Also included were all the supplemental payments made for non-recurring special needs and all vendor payments.

The Department discussed and received approval for the sample size and statistical procedures used in the survey from HEW's statistical consultants. (Defendant's Exhibit 3, pages 74 - 94, Deposition of Richard Gertzoff).

The Department then offered the plaintiffs' counsel the right to audit the entire audit trail including computer print outs, all data sheets and all the material on which the flat grant was based. (Defendant's Exhibit 3, pages 82-83. Deposition of Richard Gertzoff). As a result of the offer, the plaintiffs' counsel on various dates starting on October 22, 1971, came to the Department, was given the material, and also was allowed free use of the computer and free key punch time to verify the samples. They were further given the complete computer print out which was used by their experts, Mr. Hoffman and Professor Hadden, when they testified as early as February 28, 1972.

After the sample was run and all the necessary updating was accomplished, the Department compared the cost of the new flat grant with the cost of the old system and found that the new system would add a cost of $4,500,000 a year more to the $96,000,000 that was presently being budgeted. This was an increase of approximately 5 per cent.

There were many reasons for this increase including the annualizing of one-shot payments throughout the entire year and including items that would be paid outside the flat grant, etc. [Appendix, pages 86(a) and 87(a)]

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN CONSOLIDATING THE DEFENDANT'S (APPELLEE) MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION WITH A TRIAL ON THE MERITS.

The Appellants have raised the claim that the Trial Court consolidated the Defendant's Motion to Dissolve the Preliminary Injunction with a Trial on the Merits without notice to them in violation of Rule 65(a)(2) of the Federal Rules of Civil Procedure and cited several cases on pages 27 and 28 of their Brief to support their claim.

Rule 65(a)(2) contains no language concerning any entitlement to notice to parties when the Judge consolidates a preliminary injunctive hearing with a hearing on the merits. The Rule specifically allows the Court, before or after the commencement of a hearing for an application for a preliminary injunction, to order a trial of the civil action on the merits.

Because there is no specific language stating that notice must be given the parties, the District Court's action should only be reversed, and the case remanded, if the lower court's action was essentially arbitrary or inequitable. As a writer in the field of federal procedures has observed concerning consolidation, "What is required is that the parties be given a full opportunity to present evidence in the case." Moores Federal Practice, Vol. 7, Section 65-04(4).

The complaint cannot be raised where the Appellants may fail for some reason to take advantage of the oppor-

tunity to present evidence and now want a second chance. A comparison of the factual situation of the cases cited by the Appellants with the factual situation presented in the civil action before this Court will show that not only did the Appellants have an opportunity to prepare, develop and present their case, but it clearly shows that they waived any right to raise this issue by their actions subsequent to the trial on May 23, 1975.

In the cases cited by the Appellants on this issue, the Trial Court's decision to consolidate a preliminary injunctive hearing with a trial on the merits, was made within several days of the bringing of the original complaint. In Brooks v. Nacrelli, 415 F.2d 272, the preliminary injunctive hearing was held 6 days after the complaint was filed in court. In Pughsley v. 3750 Lake Shore Drive Cooperative Building, 463 F.2d 1056, the complaint was filed May 7, 1971, with the preliminary injunctive hearing being held May 17, 1971. In the case of Inmates

of Attica Correctional Facility v. Rockerfeller, 453 F.2d 12, the complaint was filed September 13, 1971, and the preliminary injunctive hearing was held on September 27, 1971. In Capital City Gas Co. v. Phillips Petroleum Co., 373 F.2d 128, the defendant had just filed his answer raising three affirmative defenses when the judge consolidated the preliminary injunctive hearing with a trial on the merits. It would seem reasonably clear that the above cases reversed the Trial Court because the Appellants never had a chance to initiate discovery procedures, take depositions or research the law.

In the present appeal the complaint was filed on September 13, 1971, the preliminary injunctive hearing was held by the Trial Court on October 20, 1971, and the consolidated hearing was not held until May 23, 1972, some 8 months and 10 days later. During this time, the plaintiffs had full use of the discovery procedure,

examined the Department's employees at length by depositions which were later filed in Court as full exhibits, took depositions from their own witnesses which were later filed in Court as full exhibits, and were given complete access to the Appellee's files. There is no question that they had the complete computer print out, and they further wrote and phoned HEW constantly during this period.

On May 23, 1972, the date of the trial, the Appellants presented witnesses who testified to the substantive issues that are now being appealed. These witnesses had ample time to read the material, and in fact, two of the witnesses had previously given depositions on February 28, 1972 on the issues now being appealed.

At the time of the trial, the Appellants had possession of HEW's amicus brief, and had time to question HEW on any of the issues in the brief and in the appendices attached to the brief.

Any claim made by the Appellants now that they missed putting on some testimony was not as a result of any lack of opportunity to present that testimony.

Not only did the Appellants have ample opportunity to prepare and present their case, it is obvious that until approximately June 17, 1975, 3 years and 5 days after the decision was handed down by the Trial Court, they believed that they were having a hearing on the merits on May 23, 1975.

When the Appellants filed their Motion to Reopen, Set Aside, Alter and Amend the Judgment on June 23, 1972, only several days after the Judgment had been rendered, they easily could have raised this issue of the alleged wrongful consolidation and thus given the Trial Court a fair opportunity to correct this error, if indeed the Court had committed one. There are obviously only two explanations why they did not do so.

The first explanation was that the Appellants knew that the Trial Court's action was proper in consolidating the Motion to Dissolve the Preliminary Injunction with the Hearing on the Merits. The second, and only other plausible explanation, was that they intended to ambush the Trial Court later in the Appellant Court.

The fact that Appellants moved to reopen the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure strongly indicates that they acquiesced in the consolidation because Rule 59 deals with new trials. One cannot have a new trial unless they have already had an initial trial.

The Appellants' wait of 3 years and 5 days to raise this issue is extremely prejudicial to the Appellee. The Appellants knew for the first time when the Appellee moved for his first enlargement of time that Richard Gertzoff, the Appellee's statistical expert, was now

deceased. It would be practically impossible to find another expert familiar with the set up and the programing of this flat grant.

Further, the Department has now had the Flat Grant System in operation for 3 years. As a result, it is impossible to get W-52T's at this time based on the old AFDC budgets in order to make up a new sample.

That the Court's action in consolidating the case did not prejudice the Appellant is clearly demonstrated from the fact that the Appellants filed a 120 page Brief covering every issue that is now on appeal, and after filing that Brief, the Court still gave them an opportunity to respond to Appellee's Brief. (Trial Transcript dated May 23, 1972, page 184)

To send the case back at this time would be a gross injustice to the Appellee.

II

THE COURT MUST GIVE GREAT DEFERENCE TO HEW'S APPROVAL OF THE CONNECTICUT FLAT GRANT PROGRAM.

Not only had the Appellee initially requested and received HEW's approval of the statistical methods used in the change over to the flat grant program, but on November 16, 1971, the Trial Court specifically requested HEW to help the Connecticut Welfare Department develop a flat grant program that would satisfy all the federal requirements, particularly the requirements of 42 U.S.C. §602(a)(23).

The Court requested HEW not merely to limit itself to filing an amicus brief on the final program but to actually employ its expertise in assisting the State in developing a proper program. As a result, the State actually submitted three separate versions of their

family assistance plan before HEW was satisfied. (HEW Brief, pages 1 and 2, Johnson v. White, 353 F.Supp. 60, 73).

Because of the Court's admonition, the Appellee consulted with HEW on every aspect of its program including sample size, confidence interval, and amount of updating, etc. In fact, the Appellee deferred to every suggestion given by HEW so that the completed program could be well called the model HEW flat grant family assistance program. [Appendix, pages 88(a) and 89(a)] No other state, involved in setting up the same type of flat grant program, had the constant and continuous supervision in the development of that program by HEW, as did the Appellee, Connecticut Welfare Department.

The threshold question this Court should, therefore, consider is what deference should be given to HEW's interpretation of 42 U.S.C. §602(a)(23) and what weight should be given to the validity of their suggestions to

the Connecticut Welfare Department in the development of the flat grant program.

Federal courts have consistently held that the greatest deference will be given by the judiciary to an administrative agency's interpretation of those statutes which affect that particular agency. Udall v. Tallman, 380 U.S. 1, 16; F.M.B. v. Isbrandtsen, Co., 351 U.S. 481, 499-500; Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280; Burns v. Alcala, 43 L.W. 4374, 4377.

This Circuit has previously held that the only requirement needed to sustain HEW's interpretation of a federal statute is that the interpretation be a reasonable one. The fact that the one challenging HEW may have a more reasonable interpretation is of no consequence. Connecticut State Welfare Department v. Department of Health, Education and Welfare, 448 F.2d 209, 213, 215.

Not only must the Court give greatest deference to HEW's interpretation, but the one attacking the agency's interpretation bears a heavy burden.

> "Given the deference normally accorded an administrator's interpretation of the statutory scheme he carries out, those who attack that interpretation necessarily carry a heavy burden." Johnson's Professional Nursing Home v. Weinberger, 490 F.2d 841, 844.

With this admonition in mind, the Court should look to what Rosado v. Wyman, 397 U.S. 397, required the states to do to carry out the Congressional mandate of 42 U.S.C. §602(a)(23).

III

ROSADO V. WYMAN, 397 U.S. 397, NEITHER SEVERELY LIMITS THE STATE'S POWER TO SET ITS STANDARD OF NEED IN AFDC CASES NOR REQUIRES THE STATE TO USE MATHEMATICAL NICETY IN COMPLYING WITH 42 U.S.C. §602(a)(23).

Before answering each of the Appellants' individual claims of error, it would be helpful to the Court to point out what the states were, and were not, required to do pursuant to the Supreme Court's interpretation of 42 U.S.C. §602(a)(23).

Appellants, throughout their Brief, seem to indicate that Rosado requires the standard of need to actually and realistically reflect the need of AFDC recipients if the states are to comply with 42 U.S.C. §602(a)(23). This is simply not true. Not only does the language of §602(a)(23) not require the standard equal actual need, but neither does Rosado, nor any of the other Supreme Court cases which discussed standard of need both before and after the Rosado decision, require it.

Well before Rosado, King v. Smith, 392 U.S. 309, 318-319, stated:

> "There is no question that States have considerable latitude in allocating their AFDC resources since each State is free to set its own standard of need and to determine the amount of benefits by the amount of funds it devotes to the program."

This language in King is cited two years later in Jefferson v. Hackney, 406 U.S. 535, 541, well after the Rosado decision. As Jefferson said, "In Rosado v. Wyman, supra, the Court reviewed the history of this section [42 U.S.C. §602(a)(23)] and rejected the argument that it worked any radical shift in the AFDC program." Jefferson, supra, page 542. See also Stinson v. Finch, 317 F.Supp. 581, 583-584, recognizing the "undisputed power of the state to determine its standard of need and citing as authority, Rosado, Dandridge v. Williams, 397 U.S. 471, and King."

There is no question that Jefferson stands for the proposition that a state can start with an artificial, unrealistic standard of need and end up with an artificial, unrealistic standard of need after complying with §602(a)(23) so long as it substantially updates the components that originally made up the standard and leaves out no items that affected the lives of the majority of AFDC recipients.

> "We do not agree that Congress intended §402(a)(23) to invalidate any state computation procedures that do not absolutely maximize individual eligibility for subsidiary benefits ... (T)here is nothing in this legislative history indicating that it was part of the statutory purpose. Indeed, at the same time Congress enacted §402(a)(23), it included another section designed to induce States to reduce the number of individuals eligible for the AFDC program." Jefferson, supra, page 542.

It seems clear from the language of Rosado that the Court did not require states to set or update their standard of need with mathematical nicety or exactitude nor did Rosado expect that every insignificant item should be included.

Justice Harlan, a very precise jurist, in discussing the effects of §402(a)(23), never spoke in absolutes but instead used the words "significantly", "substantially" and "majority". To comply with §402(a)(23), Harlan set only 3 requirements in updating the standard of need:

First, the state was foreclosed from significantly reducing the standard of need. Rosado, supra, page 417.

That Connecticut did not reduce the standard is proven from a comparison of the cost of the new Connecticut Flat Grant Program with the old system. This showed an increase in the standard of $4,500,000 a year or approximately a 5 per cent rise. Johnson v. White, 353 F. Supp. 69, 74. This 5 per cent increase was in addition to the updating of any significant item which made up the standard of need.

Second, the state could not substantially alter the content of the standard of need. Rosado, supra, page 419.

The Appellee made no substantial changes in the content, and the Appellants have shown none. The Appellants claim that the standard of need is unrealistic because the rent standard included prorating rent in shared households. However, this does not reduce or alter the standard because the method of prorating existed in the old system and was properly updated to reflect changes in the cost of living in the new flat grant. All that happened here was that an

already existing method of setting rent standards in shared households was updated.

Third, the state cannot exclude items that constitute part of the reality of existence for the majority of AFDC recipients. Rosado, supra, page 419.

There is no claim by the Appellants that any item that made up the old standard is not accounted for in the new grant. In fact, Connecticut included and updated many items of special need in the flat grant that did not constitute the reality of existence for the majority of recipients. Items of special need, which were included in the flat grant, such as chore boy, telephone, garbage collection, etc., constituted the reality of existence for hardly any recipients. Yet, they were updated and included in the standard. Other special needs such as therapeutic diets, essential services, moving expenses, hearing aides, etc., were also included in the standard although they would be paid over and above the flat grant in the new program.

Once these three requirements have been met, it is obvious that something less than a perfect, precise standard is acceptable under the Rosado interpretation. Rosado v. Wyman (on remand) 322 F.Supp. 1172, 1183.

A most important consideration for this Court is the fact that Rosado must be restrictively interpreted favoring the state in every case of doubt.

> "Nevertheless, we think our interpretation of the Section [402(a)(23)] which agrees with the defendant is more consonant with the cautious approach of Rosado. Finding no clear legislative history, the Court interpreted Section 402(a)(23) restrictively. No significant or far reaching reforms in the welfare laws were to be educed from a bill of such blurred origin." Jackson v. Department of Public Welfare of the State of Florida, 317 F.Supp. 1151, 1160-1161.

IV

THE BURDEN OF PROOF IN THE PRESENT ACTION RESTED ON THE PLAINTIFFS (APPELLANTS).

The Appellants on page 16 of their Brief claim that the Appellee, Welfare Commissioner, bore the burden of justifying its new schedules, and they claim the Trial Court should not have put the burden of proof on the recipients to demonstrate that they were "charged more for rent than the prorated maximums budgeted by the defendants."

The Appellants cited Rosado v. Wyman (on remand) 437 F.2d 619, 628, for their authority that the burden in the Trial Court rests on the defendant, Welfare Commissioner.

The language in Rosado which states: "Its (states) burden to justify the new schedules,..." is subject to two interpretations. New York had lost its case in the

lower court twice and once in the Supreme Court. It is now on appeal to the Second Circuit from a second adverse District Court decision.

There is not much question that on appeal from the Trial Court the Appellant has a burden of showing error on the part of the Trial Judge. Engine Specialties, Inc. v. Bombardier, Inc. 454 F.2d 527, 530. If the Rosado court at page 628 were putting the burden on New York as Appellant, they were correctly applying the law. But, this interpretation does not help the present plaintiffs who lost in the Trial Court. However, there is not much question in the Appellee's mind that this is what Rosado meant on page 628.

If, on the other hand, the Appellant Court meant that the burden to justify the flat grant program was on the defendant in the Trial Court, the Appellee does not believe that this is the correct interpretation of the law.

The burden of proving facts is on the party who wants them in the record, and under Connecticut law, the burden of proof is on the party asserting the truth of a proposition. Nash v. Reincke, 212 F. Supp. 877, 884; affirmed 324 F.2d 310; cert. denied 377 U.S. 938. Chambers v. Bickle Ford Sales, Inc., 313 F.2d 252, 255-256.

The plaintiff generally has the burden of proving those facts in a case which will entitle the plaintiff to judgment. The test of who has the burden of proof rests on who would prevail if no evidence were presented.

Because the Appellee, as a public official, acting in his public capacity, is entitled to the presumption thqt he acted properly and obeyed the law in setting up the Flat Grant, (See Thompson v. Housing Authority of the City of Miami, 251 F.Supp. 121, 124; and Salts Textile Mfg., Co. v. Ghent, 107 Conn. 211, 225) it is obvious that

the plaintiffs in the present civil action would have had to present some evidence to overcome the presumption.

It is particularly true in welfare cases that the burden of proof rests on those plaintiffs who are attacking the actions of the State Welfare Commissioner. Ward v. Winstead, 314 F.Supp. 1225, 1237. Jedrzewski v. Minter, 334 F.Supp. 114, 117.

The only time the burden would probably shift to the defendant, State Welfare Commissioner, is when his actions on their face affect First Amendment rights or discrimination on the basis of race, situations that do not prevail here. The other exception is where the statute involved specifically states that the burden is shifted onto the defendant. There is no language in 42 U.S.C. §602(a)(23) shifting any burden on the Appellee.

This situation would appear to be analogous to Alyeska Pipeline Service Co., Petitioner, v. The Wilderness Society, U.S. , 44 L.Ed.2d 141, where the Supreme Court recently said that the usual American rule regarding costs would not be changed unless the statute, under which the suit was brought, specifically allowed these costs.

V

THE CONNECTICUT WELFARE DEPARTMENT PROPERLY UPDATED ALL THE ITEMS WHICH MADE UP THE STANDARD OF NEED.

The Appellants claim that the State improperly updated the costs of the items making up the standard of need because it did not use the Northeast Region Consumer Price Index, which Index the Appellants have set forth in part on pages 18 and 19 of their Brief.

What they failed to tell this Court is that the regional method of measuring price indexes was not being published at the time the State was updating its items. This regional method was not published until the Fall of 1973. (See Appendix I attached to this Brief)

At the time of the updating, there was a United States City Average Index and a Standard Metropolitan Statistical Index of 23 Cities. Because Connecticut was in none of the metropolitan areas, HEW suggested they use the United States City Average Index. (See HEW Brief pages 5 and 6)

Had this regional index existed at the time, it would not have been comprehensive enough for updating the Connecticut Flat Grant because it only gave the price index rise and fall at 3 month intervals and it only broke the items in the index into 5 major categories.

Connecticut was not bound to use any particular price index.

> "This does not say that a State must use a particular price index, or must add need items which were previously omitted, or even reflect current prices." Jackson, supra, page 1161.

All the State is required to do is to use a reasonable and equitable method of updating. Connecticut's method was more than reasonable with the State doing more than was required with the result that it over-updated many of the items in the standard.

Connecticut updated all the items to dates well after January 2, 1968, updating some items to the actual cost through May, 1971. Yet, the Department could have used the Consumer Price Index of January 31, 1968, and updated all those items only to that date.

The reasons why Connecticut would only have to update past January 2, 1968, are many.

First, the language of §602(a)(23) only requires that sometime between January 2, 1968, the effective date of

the statute, and July 1, 1969, the State update their standard of need. There is no language in the statute or in the Congressional history that states were required to update to any date certain.

Considering the undisputed power that the states have to fix their standard and the restrictive interpretation to be given §602(a)(23), any decision to update only through January 2, 1968, would be given correct weight.

Second, if Congress intended to affect the states' undisputed right to fix standards by forcing them to update to certain specific dates, this intention must be clear in the statute. New York State Department of Social Services v. Dublino, 413 U.S. 405, 413. Schwartz v. Texas, 344 U.S. 199, . Employees of the Department of Public Welfare v. Missouri, 411 U.S. 279, 284-285.

Third, Connecticut's federal courts have interpreted the language in §602(a)(23) to indicate that a state is required to only update through January 2, 1968.

> "To comply with §402(a)(23), defendants must now increase the amount needed for the clothing component by a percentage that reflects the rise in the price of that item between the time the prior amount was set and January 2, 1968, when §402(a)(23) became effective." Alvarado v. Schmidt, 369 F.Supp. 447, 454. See also Alvarado, supra, page 455 and Jackson, supra, page 1160.

All that is required in updating is that the state use an equitable method that fairly reflects the change in the cost of the items, and Connecticut's method was equitable.

In most cases, the Department priced the item in the field at actual cost at dates well after January 2, 1968, and updated to that date using the actual price of the item or the rise in the Consumer Price Index, whichever was higher.

Laundry and self-service laundry were actually priced in the field at 1970 and 1971 prices respectively and then updated to those dates. (Defendant's Exhibit 24, Deposition of Jean Seckinger, pages 11, 12)

Transportation costs were actually gotten from AAA for the year 1970, which showed the cost per mile for gas, oil and lubrication, which was all the Department allowed, to be .0395 cents per mile. (Defendant's Exhibit 4, Deposition of Jean Seckinger, page 18) Nevertheless, the Department used the standard of 4 1/2 cents per mile and updated an additional 1/2 cent for a total of 5 cents per mile.

Clothing was actually priced in both major catalogues and by shopping in local stores throughout the state. (Defendant's Exhibit 24, Deposition of Jean Seckinger, pages 22 and 24) This actual pricing was used as a check against the Consumer Price Index.

Garbage was priced at actual cost as were scout uniforms and every other item.

The food cost update was more than adequate. The Department updated food from October 1, 1967 to October 1, 1968, where the Consumer Price Index showed a rise in cost from 112.9 to 116.8 or 3.9 per cent. On October 1, 1967, the food standard for one adult was $38.75 per month. Based on the 3.9 per cent rise, this would show a rise in actual costs of $1.51 so that the accepted update as of October 1, 1968, would be $40.26. However, the Department made the new standard $40.50, a 24 cent or 6 tenths of a per cent additional increase.

The Department also updated the rent maximums to $160 per month based on a rent survey of October 1, 1969. (Defendant's Exhibit 24, Deposition of Jean Seckinger, page 35)

Further, a sub-survey of rents, which was done to show what the May. 1971, rents were, showed that the money

paid for rents actually paid the recipient's rent in 98.3 per cent of the cases. Johnson, supra, page 77.

It is interesting to note that this survey was done nearly 2 years after July 1, 1969, and nearly 3 1/2 years after the required date of July 2, 1968.

Finally, in handling the basic needs of food, clothing, personal incidentals and household supplies, the Department could have used a lower pre-added schedule for the standard of children aged 4 to 12. Instead, the Department used the actual amounts from the survey, which survey was higher than the pre-added schedule.

VI

THE CONNECTICUT STANDARD OF NEED WAS PROPERLY BASED ON UPDATED STANDARDS FOR EACH ITEM AND PROPERLY UPDATED MAXIMUMS.

The Appellants claim that the Department's Flat Grant standard was improper because it was based on maximum grants and not the recipient's needs. As the Appellee has already pointed out, neither §602 (a)(23) nor Rosado, requires a standard based on need, although Connecticut's standard did reflect need in nearly every item in the standard.

Connecticut's budgeted needs were based on a standard, which standard was based on actual surveys in the field and an updated cost of living index with all the items and maximums properly updated.

Even if the Connecticut standard of need was based on a consolidation of maximums, this resulting standard would satisfy the requirements of §602(a)(23). Houston Welfare Rights Organization, Inc. v. Vowell, 391 F.Supp. 223, 230.

> "A state that continues its program of allocating maximums does not violate §602(a)(23) so long as it adjusts the maximums to reflect changes in living costs as of July 1, 1969." See also Alvarado, supra, page 447.

VII

CONNECTICUT'S SHELTER STANDARDS OF NEED COMPLIED WITH THE REQUIREMENTS OF 42 U.S.C. §602(a)(23).

The Appellants particularly attacked the Connecticut shelter standard of need claiming that Connecticut's prorating shelter payments in cases where the AFDC recipient lives with non-welfare persons violates §602(a)(23) because this prorated standard does not reflect need. They also claim that this prorating is a violation of 42 U.S.C. 606(a) as interpreted by VanLare v. Hurley, U.S. , 43 U.S.L.W. 4592.

VanLare is not relevant to this case because it dealt with whether the state could conclusively presume that shelter assistance payments could be reduced when a lodger shared a home with an AFDC family. In the present case, the Court is dealing with whether or not a standard, either unrealistic or artificial, was properly updated.

There is no question that these prorated standards were properly updated. What the Department did was to take the rents as they were actually budgeted, which also included over-standard rents in 38 per cent of the private rents. The Department looked at the situation as it actually existed.

If this resulted in lower standards in shared households, it may have resulted in a lower standard originally, but this lower standard was properly updated. The Court in Houston, supra, page 232, discussed this same problem of shared households and justified it on the basis that a state had a right to define its standard of need for shelter in this manner.

When Rosado discussed obscuring the standard, it was concerned only with the state obscuring the standard by an improper updating not how far short from realism the standard was originally or after the updating. If the Court followed the Appellants' interpretation of obscuring the standard, no southern state could ever had complied with §602(a)(23). Further, as the Trial Court observed in

Johnson, there was no evidence presented that the non-recipients could not pay their share of the shelter.

Most of the shared households in the present case were a result of the AFDC payments going to the children of mothers who had ceased to be a supervising relative as a result of their remarriage. The children were sharing the home of the mother and new husband.

This was not the case of the lodger sharing the AFDC household held by a S/R. VanLare seems to rest on a premise that the AFDC shelter payments should not be reduced because the male lodger in sharing the S/R's bedroom may not cause any increase in the necessity for more room space. In the present case, the remarriage of the mother, who is now no longer on welfare, would certainly indicate that more room space is needed than would be needed by the AFDC children alone.

The zero rents, which the chart on page 14 of the Appellants' Brief show were only 3 per cent of the sample,

were, except for assistance unit size one, caused in many cases by the recipients living in home-owned property not mortgaged. In these zero rent cases the Department had actually not paid for the shelter before the passage of §602(a)(23), and this reflected how the recipients actually lived.

VIII

THE CONNECTICUT WELFARE DEPARTMENT'S STATISTICAL PROCEDURES WERE PROPER.

The Appellants claim that the Department's statistical procedures were improper because they didn't determine the reliability of each individual item of need, but instead determined the reliability on the whole budget of each individual family.

There is no question that the reliability factor on the whole budget of each family fell well within the de-

fendant's level of confidence of 95 per cent with an interval of estimate of ± 10 per cent. (See HEW Brief, Appendix II for a description of Connecticut Welfare Department's Statistical Method)

This statistical method was approved by HEW. [Appendix, pages 88(a) and 89(a)]

If the Appellants' method was used for determining reliability of each item, the Appellee could not have been able to use sampling to establish the flat grant but would have had to survey every sample item in the entire AFDC population. [Appendix, pages 79(a) and 80(a)]

IX

THERE SHOULD BE NO REMAND TO CORRECT ANY CLAIMED ERRORS IN THE CONNECTICUT FLAT GRANT PROGRAM.

The Appellants claim that this Court should remand this case to correct certain errors they claim were made.

First, the Appellants claim the Department made errors by including an assistance size 2 family in averaging the assistance 10 families and also made a mathematical error in assistance unit size 12.

The Appellants had 3 experts read the entire computer print out of the sample in the late Fall of 1971. Two of these experts testified by deposition in February, 1972, and all 3 experts testified on May 23, 1972. Although these experts had plenty of time to find these claimed errors, there is no testimony by them that these errors existed. [Appendix, page 84(a)]

The third claimed error on household furnishings is without merit, not only because HEW and the Trial Court approved of the price index used, but household furnishings were actually priced in the field as a check against the Consumer Price Index. (Defendant's Exhibit 24, Deposition of Jean Seckinger, Page 28.)

As to the claim made about personal incidentals, these items were repriced in October of 1967 (Defendant's Exhibit 4, Deposition of Jean Seckinger, Page 8) and were updated properly to October 1, 1968.

There is no evidence to support Appellants' claim of improper pricing.

CONCLUSION

The Appellees respectfully request that this Court sustain the decision of the District Court.

Respectfully submitted,

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Measuring regional price change in urban areas

New indexes of price change in urban areas indicate that regional influences are significant factors in price behavior

TOSHIKO NAKAYAMA AND DIANE WARSKY

THE Bureau of Labor Statistics has developed a new set of consumer price indexes which measure price change in urban areas grouped by regions. These indexes add a new dimension to analysis of price data by providing alternative measures for comparison with the U.S. city average and by permitting comparisons of price change among different regions of the country.[1] The new indexes will be published four times a year—for the months of March, June, September, and December—in the monthly *Consumer Price Index Report* and in the *Monthly Labor Review*. This article describes the new indexes and provides a brief analysis of their behavior over the past 6 years.

Description

The new indexes are calculated from price data collected in 54 of the 56 metropolitan and nonmetropolitan urban areas of the United States for the national Consumer Price Index. Anchorage and Honolulu are not included. The areas are grouped into four broad regions.[2] For each of the regions, indexes will be available for all items and for the following subgroups: food, housing, apparel and upkeep, transportation, and health and recreation. Table 1 shows the relative importance of regional indexes for all items and major subgroups in the weighting structure of the U.S. city average Consumer Price Index. Tables 2 through 5 give historical indexes for the four regions.

No individual city indexes currently published will be replaced by the new indexes. The Bureau will continue to publish separate monthly indexes for each of the five largest metropolitan areas in the CPI, and separate quarterly indexes for each of the 18 other areas.

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The indexes for urban areas classified by geographic region cannot be used to determine differences in price *level* at any particular time. They indicate only that prices in a region have changed more than, less than, or as much as in another region. Further, these new indexes do not necessarily constitute the best indicator of price behavior in a given city located in a particular geographic region. Local factors can produce a diversity of price experience among cities within a region. Previous studies (see footnote 1) have shown that there are differences in price movement among urban areas of different population sizes. City-size differences in price behavior are likely to occur also within regions.

Historical pattern

From December 1966 through December 1972, the indexes for all items and for all subgroups of goods and services increased (in percentage terms) more in the Northeast region than in any of the other three:

	United States	*Northeast*	*North Central*	*South*	*West*
All items	29.1	32.4	27.6	28.3	25.7
Food	26.4	28.7	25.7	26.2	23.5
Housing	32.7	37.3	28.9	33.3	30.7
Apparel and upkeep	26.9	28.2	26.9	26.6	24.7
Transportation	23.5	29.2	23.2	19.6	20.3
Health and recreation	30.5	33.8	31.2	29.9	23.9

Increases were smallest in the West, except for housing, which was smallest in the North Central region, and transportation, which was smallest in the South.

Cyclical behavior of CPI by regions. Changes in indexes over the entire 6-year period mask some aspects of the behavior of these indexes during those years, particularly cyclical changes. The National

U. S. DEPARTMENT OF LABOR
Bureau of Labor Statistics

Bureau of Economic Research designated the business cycle peak as occurring in November 1969 and the trough in November 1970. The yearly rate of advance in the Consumer Price Index, at the national level, reached a peak in 1969, when it rose 6.1 percent (December-to-December change). The increase slowed to 5.5 percent in 1970. The Economic Stabilization Program was announced in August 1971, with a 90-day wage-price-rent freeze, and the rise in the CPI at the national level slowed to 3.4 percent in 1971. The increase remained the same in 1972 during Phase 2 of the program.

December-to-December changes in the all-items index for all regions, except Northeast, followed the same general pattern as those in the U.S. all-items index. There were differences, however, in the magnitude of changes, as the following tabulation shows:

	1967	*1968*	*1969*	*1970*	*1971*	*1972*
United States	3.0	4.7	6.1	5.5	3.4	3.4
Northeast	2.7	5.2	6.4	6.4	4.1	3.9
North Central	3.3	4.3	6.2	5.0	2.9	3.1
South	2.9	5.0	6.2	5.0	3.3	3.0
West	2.9	3.8	5.4	4.9	2.7	3.6

Analysis of the price indexes by subgroup for each region shows a different pattern from that of the all-items index. In most regions, the rise in the food index accelerated sharply in 1969, slowed markedly in 1970, became faster in 1971, and continued to accelerate in 1972. Increases in the apparel and upkeep subgroup peaked in 1968 in all regions and became successively smaller each year through 1971. In 1972, increases were somewhat larger than in 1971 in all regions except the West, where deceleration continued. The rise in the transportation subgroup indexes peaked in all regions in 1970. In 1971, these indexes showed no increase in the West and small increases in other regions. The rise accelerated noticeably in 1972 in the West, but in other regions it remained about the same as in 1971.

The year-to-year movement of the subgroup indexes for housing and for health and recreation behaved differently among regions. In all regions except the Northeast, the rise in the housing index peaked in 1969, increased at about the same rate in 1970, and slowed substantially in 1971. The increase in 1972 remained about the same as in 1971 in the North Central and Southern regions, but became larger in the West. In the Northeast, the rise in the housing subgroup continued to accelerate through 1970 before decelerating in 1971. The 4.8-percent increase in 1972 was slightly smaller than the 1971 increase, but still considerably larger than increases in the other three regions.

The rise in the index for the health and recreation subgroup accelerated through 1970 in the Northeast and North Central regions, decelerated significantly in 1971, and slowed further in 1972. In the South, the rate of advance decelerated after 1968, with a sharp slowdown in 1972. In the West, the increase was about the same each year from 1968 through 1971, but considerably smaller in 1972.

Comparison with indexes by population size. From 1966 to 1972, the all-items index for urban areas in population class A-1 (3.5 million inhabitants or more) increased 31.2 percent, the largest increase for any population-size class.[3] The smallest price increase—26.3 percent—occurred in the smallest urban areas, those with 2,500–50,000 inhabitants (group D). Thus, among groups of cities classified by population size, the range between the greatest and the smallest price increases was only 4.9 percentage points. The all-items regional indexes presented here exhibited greater variability in price change over the same period—6.7 percentage points between the increase of 32.4 percent in the Northeast and 25.7 percent in the West.

For three of the five subgroup indexes (food, housing, and health and recreation), the difference in percentage points between the largest and the smallest price increases from December 1966 to December 1972 was greater in the regional indexes than in those by population size. The reverse was true for transportation. For apparel and upkeep, the

Table 1. Relative importance in the U.S. Consumer Price Index of regional indexes of all items and major groups, December 1972

Region	All items	Food	Housing	Apparel and upkeep	Transportation	Health and recreation
U.S. total	100.00	22.57	32.00	10.42	13.18	19.83
Northeast	33.27	8.04	10.84	3.68	4.09	6.62
North Central	28.30	6.28	9.69	2.81	3.88	5.64
South	21.86	4.79	7.52	2.35	2.93	4.27
West[1]	16.57	3.46	5.95	1.58	2.28	3.30

[1] Excludes Hawaii and Alaska.

NOTE: These data indicate the percentage of the U.S. "all items" Consumer Price Index weight represented by each regional index as of December 1972.

state as to often exceed such maximums. Section 39- - page 2 of the

CERTIFICATION

This is to certify that on the 6th day of August, 1975, two copies of the Brief of Appellee were mailed to the following counsel of record:

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